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No. 82-428

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

IN RE: ESTATE OF PAUL CIAFFONI, Deceased

ELIZABETH CIAFFONI COWDEN, Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

RESPONDENTS' BRIEF IN OPPOSITION

Peter M. Suwak, Esq.
Attorney for Respondents
429 Washington Trust Bldg.
Washington, PA 15301
(412) 228-4885

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Appendix A-1

Excerpts from the brief submitted on behalf of Elizabeth Cowden (Appellee below; Petitioner herein) before the Pennsylvania Supreme Court in January, 1982, in support of her position overturned by the May 20, 1982 judgment of the State Supreme Court here at issue A1-A11

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Respondents, Concetta Ciaffoni and Robert J. Ciaffoni, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Supreme Court of Pennsylvania entered in this case on May 20, 1982.

Opinions Below

Referenced and Reproduced in Petition for Writ of Certiorari, p. 2.

Jurisdiction

This Court lacks jurisdiction in that:

a. The instant petition for writ of certiorari is not timely.

b. No issue arising under any title, right, privilege or immunity has been properly set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, as required by 28 U.S.C. §1257 (3).

These issues are developed in the body of the following brief.

Questions Presented for Review

Were the Petitioner's Constitutional Due Process or Equal Protection rights contravened when the Pennsylvania Supreme Court granted a motion for new trial, treating it as a second application for reargument, vacating a prior decision, and determining that documentary evidence of fraud possessed

probative value in a will contest, thereby remanding the matter for a complete re-trial?

Procedural Provisions Involved

Pennsylvania Rule of Appellate Procedure 105 (a):

> In the interest of expediting decision, or for other good cause shown, an appellate court may,... disregard the requirements or provision of any of these rules in a particular case...on its own motion and may order proceedings in accordance with its direction.

Statement of the Case

In essential outline, the chronology of lower court proceedings which brings the matter to this point is as follows:

1. September, 1978: Pennsylvania Orphans' Court (Judge Earl S. Keim) rules that documentary evidence of routine practice lacks probative value in a will contest. Challenged will upheld in view of lack of admissible evidence.

2. August 27, 1979: Pennsylvania Orphans' Court (Judge Earl Keim) dismisses exceptions to its rulings, affirming its earlier ruling that the documentary

evidence of routine practice lacked probative value.

3. April 30, 1980: The Pennsylvania Supreme Court affirmed the Orphans' Court ruling, per curiam, without a written opinion. Justice Roberts filed a vigorous dissent citing long-established Pennsylvania precedent supporting the probative value of the excluded evidence and urging wide latitude in uncovering fraud. The ruling noted that Justice Flaherty did not participate in the consideration or decision of the case.

4. June 16, 1980: The Pennsylvania Supreme Court denied an application for reargument without comment. Justice Roberts indicated he would grant the application.

5. November 13, 1980, a petition for writ of certiorari was docketed with the U.S. Supreme Court. This Court denied the application, presumably on the grounds that no substantial federal question was presented, although the petition claimed due process of law violations.

6. July 25, 1980 and May 8, 1981, motions for new trial, nunc pro tunc, were filed with the Pennsylvania Orphans' Court. These motions requested a new trial on three grounds:
   a. after-discovered evidence, of similar type, confirmed the probative value of the earlier documentary evidence.

b. perjury constituting a fraud upon the court had led to the earlier evidentiary rulings.

c. due process rights of the will contestants had been violated, through the denial of their right to a fair and impartial tribunal on appeal.

The Orphans' Court dismissed these motions summarily, without hearing. Appeals were taken.

7. December 22, 1981: following consolidation of appeals, the matters were transferred to the Pennsylvania Supreme Court for disposition. Motions to Quash the appeal, on grounds of the finality of the earlier decision were denied. The Pennsylvania Supreme Court established a briefing schedule and set January 18, 1982 for oral argument on the several issues raised on the motions for new trial, nunc pro tunc.

8. May 20, 1982: The Pennsylvania Supreme Court, after the submission of full briefs and oral argument granted the request of the will contestants that a new trial be held to ascertain whether the alleged last will of Paul Ciaffoni had been subjected to fraudulent tampering. The Court unanimously decided to treat the appeal of the new trial motions as a second application for reargument and expressly recognized the probative value of the documentary evidence of routine practice that had been submitted at the time of the first

trial. The ruling remanded the matter to Orphans' Court, to essentially begin the entire trial process anew.

9. June 1, 1982: Petitioner herein submitted a third application for reargument to the Pennsylvania Supreme Court. This unrecognized and unauthorized application was dismissed summarily by the Court on June 10, 1982, without any opinion.

10. September 3, 1982: Petitioner herein docketed a petition for writ of certiorari to the May 20, 1982 decision of the Pennsylvania Supreme Court granting a second application for reargument. The petition was docketed more than 90 days from the grant of the second reargument application which had occurred on May 20, 1982.

Certain criti al aspects of the foregoing chronology require amplification. First, the issues presented to the Pennsylvania Supreme Court in the course of the appeal of the denial of motions for new trial, nunc pro tunc (outlined in no. 6 above) were extremely broad. The essential thrust of the will contestants' case was that the alleged last will of Paul Ciaffoni had been subjected to fraudulent tampering.

To prove this, they had submitted every known will which had been drafted by Richard DiSalle, Esq., the alleged scrivener of the last will. The typing form and word usage from these wills were then analyzed and compared to the will submitted for probate. As a result of the comparison, it was evident that there were numerous variations between the established patterns of word usage and typewriting which typified the wills prepared by Richard DiSalle and the characteristics exemplified in the challenged will. Nonetheless, the trial judge excluded the evidence, primarily on the basis that it lacked probative value, especially when considered in light of the oral testimony of the scrivener and his secretary. (Pet. A7, A15) In the new trial motions, an important element of the after-discovered evidence consisted of additional comparison wills, prepared by Richard DiSalle, which had been admitted to public record only since the

end of the last trial. It was contended that these additional wills, in combination with the earlier proferred documents, sufficiently established the reliability and probative value of the evidence. The petitioners, in resisting this argument, devoted several pages of their brief to the proposition that neither the newly-discovered evidence, nor the quite similar evidence originally proffered, had any probative value. Excerpts from their brief, submitted to the Pennsylvania Supreme Court in January, 1982, in advance of oral argument, outlining this precise argument regarding the probative value of the submitted evidence, have been reproduced and attached to this brief in Appendix A-1, A-11 These excerpts very closely paraphrase the exact arguments they made before the Court at the time of the original appeal of the matter in April, 1980.

The appeal of the denial of the new trial motions also raised other important issues. It was alleged that the after-

discovered evidence demonstrated that the scrivener, DiSalle, committed perjury when he had testified that there were no established practices regarding will preparation in his office. Accordingly, this perjury, relied upon by the Court in making its determination to exclude the evidence of the will challengers, constituted a fraud upon the Court sufficient to justify the grant of a new trial. The final key issue raised especially seemed to be important. As mentioned, the alleged scrivener of the challenged will was Richard DiSalle. Since the time of the alleged draft of the will, Richard DiSalle had been elected and appointed to several Pennsylvania Courts, at both the trial and appellate level. DiSalle had been elected to the Washington County Court of Common Pleas and had served thereon for several years. He was then appointed to an intermediate level appellate court, the Commonwealth Court of Pennsylvania, where

he served for a short time until narrowly defeated in an election to retain the seat in November, 1979. Accordingly, he left the Commonwealth Court in January, 1980. Late in 1980, he was appointed by the Governor of Pennsylvania to a position on another intermediate level appellate court, the Superior Court of Pennsylvania where he served until again narrowly defeated in a state-wide election in November, 1981. During the 1 year interim period when DiSalle was off the appellate bench, he secured employment with the Pennsylvania Supreme Court in the capacity of "consultant" to that Court. It was later discovered that DiSalle was employed secretly by the Pennsylvania Supreme Court as a "consultant", presumably with access to the inner-workings of the Court, at the very time that the Court made their rulings affirming the exclusion of the evidence of fraud that had been offered against DiSalle. It was alleged that this secret

employment constituted an "appearance of impropriety", denied the will challengers their right to a fair and impartial appellate tribunal and hence violated their rights to due process of law under the United States Constitution.

On April 30, 1982, while the appeal of denial of the motions for new trial, nunc pro tunc, were pending, the will challengers instituted suit against the Pennsylvania Supreme Court and others in the United States District Court for the Western District of Pennsylvania (W.D. No. 82-779). The purpose of filing the suit at that time was to preserve the alleged due process violations against any argument that the statute of limitations would run. (The original decision of the Pennsylvania Supreme Court under challenge had been entered on April 30, 1980, exactly two years earlier.) The basis for Count 1 of the federal suit duplicated the due process argument raised in the motion

for new trial, nunc pro tunc. Specifically, it alleged that the secret presence of Richard DiSalle, as a consultant to the Pennsylvania Supreme Court, at the time of original appeal, with apparent access, to the inner workings of the Court, created an appearance of inpropriety in violation of the Pennsylvania Code of Judicial Conduct. This appearance denied the plaintiffs (Respondents here) their Constitutionally protected due process right to a fair and impartial tribunal.

Twenty days after the filing of the federal law suit, the Pennsylvania Supreme Court issued the unanimous per curiam order granting a new trial to the will challengers. The federal suit remains active, pending in part upon the outcome of the current appeal to this Court. Should this Court seek to overturn the decision of the State Court, count 1 of the federal suit will no longer be moot.

Reasons for Denying the Writ

Numerous technical and substantive reasons exist for denying the requested writ of certiorari.

I.

The Petition for Writ of Certiorari was not Filed Timely

The petition for writ of certiorari filed by Elizabeth Cowden, the petitioner, was not filed within the time required by Title 28, United States Code, Section 2101 (c).

As outlined in the chronology in the statement of the case, the original judgement was entered in this matter on April 30, 1980. A first application for reargument was denied on June 16, 1980. After full briefing and oral argument a second application for reargument was granted on May 20, 1982, vacating prior orders and remanding the matter to a trial court for a full trial upon the merits.

The petitioner is complaining about

the entry of judgement resulting from the grant of the second application on May 20, 1982. The petition for certiorari in fact was filed on September 3, 1982, according to the petitioner's affidavit of service. Accordingly, the petition was filed approximately 106 days after the grant of the second reargument application.

It is true that the petitioner attempted to file a third application for reargument with the Pennsylvania Supreme Court. As outlined in the earlier chronology, this was denied summarily, without any written opinion. The Rules of Appellate Procedure for Pennsylvania do not permit any party to file a third application for reargument as a matter of right. No effort was made to request the Court to modify their rules to allow for such a third application. The Pennsylvania Supreme Court gave no indication that it would treat the application as

proper. In view of the absence of any color of authority to justify the filing of a third application for reargument, such a filing may not be relied upon to justify an extension of the time period for docketing the petition for writ of certiorari.[1]

II.

The Petition for Writ of Certiorari to the Supreme Court of Pennsylvania Fails to Present a Substantial Federal Question

It is clear that the bedrock issue in this matter is whether the challengers in the will contest will have the opportunity to present their documentary evidence

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[1] A reading of the Petition for Writ of Certiorari makes it quite clear that the Petitioner believes that the grant of a second application for reargument, in apparent violation of express Pennsylvania Rules of Appellate Procedure, amounts to a violation of their due process rights under the Constitution of the United States. (Pet. 14-15) If the Petitioner strongly believes that a second reargument application is unauthorized, it is hard to see how they could rely upon the filing of a third application for reargument, apparently expecting the same to toll the applicable appeal period.

of habit, custom and routine practice in support of an allegation of fraudulent tampering to a fact-finder. The essential issues involve the probative value of the evidence in a probate proceeding. It has been held that matters of a state probate court, particularly evidentiary questions, are matters exclusively of state concern. This was recognized implicitly by this very Court when it refused a petition for writ of certiorari that had been docketed on or about November 13, 1980 in this very same matter. (Concetta Ciaffoni, et. al. Petitioners v. Elizabeth Cowden, et. al., Respondents, No. 80-775). At that time the then petitioners (now Respondents) had appealed from the Pennsylvania Supreme Court's ruling that their proffered evidence lacked probative value in the will contest. The fact that the state ruling has now been reversed, that the evidence has unanimously been found to possess probative

value, that a trial will be held on the question of will fraud, does not suddenly infuse the essential issues with a federal character. There is no ground for the U.S. Supreme Court to view the underlying dispute as presenting more of a substantial federal question than when certiorari was denied in 1980.

In a final, desperate attempt to stave off a hearing and to avoid coming to judgment, the alleged fraudulent conspirator (Petitioner here) belatedly has sought to cast a due process and equal protection gloss on the questions. The Petitioner argues that she was taken by surprise when the Pennsylvania Supreme Court reversed its earlier decision. She argues that she was not provided notice and opportunity to address the ultimate issue in the case - the probative value of the evidence against her. She argues that when the Court departed from its procedural rules it set her apart, in a unique class by herself, stripped naked

of the procedural protections upon which she had relied to avoid forever a meaningful trial on the question of her fraudulert acts.

Respondents take direct issue with the factual foundation upon which the Petitioner attempts to establish her alleged Constitutional claims. The Petitioner has claimed that the Pennsylvania Supreme Court decided an issue that was not before it on appeal and which had not been briefed or argued. (Pet. p. 4) The Petitioner also has stated that "(A)t no time was any brief submitted, or argument made, concerning the merits of the evidentiary rulings made during the 1978 trial, which had been the subject of the Pennsylvania Supreme Court's judgement in affirmance." (Pet., p. 10) Petitioner's claim has no support in the record.

Counsel has attached to the appendix of this reply verbatim extracts from

Elizabeth Cowden's brief to the Pennsylvania Supreme Court submitted in January, 1982, just before the oral argument held on January 18, 1982. Issue III in the brief is expressly entitled "The alleged newly discovered evidence is inadmissible on the subjects of linguistic and typing style of the decedent's will since the scientific community has never accepted the principles and techniques involved." For several pages Cowden's lawyers repeated the arguments that had earlier been put before the Pennsylvania Supreme Court indicating that isolating writing and typing characteristics from comparison wills had no probative value. (See Appendix, pp. A1-A11) Since the majority of the after-discovered evidence alleged in the new trial motions, consisted primarily of additional documents of the same type previously offered, the probative value of both the old evidence and the new evidence was necessarily at issue. As can be seen from excerpts from

their own briefs, the issue was addressed directly.2

Contrary to the petitioner's assertion that the issue of the probative value of the challenger's evidence of fraud has never been addressed by them in meaningful manner, they have presented their position at length and repeatedly:

1. Raised issue before the trial judge in September, 1978 appearing of record in the trial transcript.

2. Repeated issue before the lower court in briefs submitted in support of dismissing exceptions in August, 1979.

3. Repeated issue before Pennsylvania Supreme Court in the course of briefs and oral argument preceding the April 30, 1980 per curiam decision.

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2 Further, counsel addressed the issue at the January 18, 1982 oral argument. At the time of the oral argument, counsel submitted the proposition that no Pennsylvania Court at any time had ever written an opinion suggesting that the precedent relied upon by Justice Roberts in his written dissent of April 30, 1980 which supported the view that the will challengers' proffered evidence had probative value had ever been rebutted. Although no record of the oral argument was prepared to the counsel's knowledge, counsel is prepared to submit an affidavit on this point if requested by the Court.

4. Repeated issue in briefs before the Supreme Court, in opposition to appeal from dismissal of motions for new trial, treated by the Court as a second application for reargument in May, 1982.

5. Repeate issue in an unauthorized third application for reargument which was summarily dismissed by the Pennsylvania Supreme Court on June 10, 1982.

To now come before this Court and request yet another opportunity to present this same, old, tired, discredited argument regarding these obvious state issues, is the height of absurdity.

In raising the false due process questions, the petitioner objects to the Pennsylvania Supreme Court's reversal of its prior position, and labelling the procedure utilized to accomplish their goal as the grant of a second application for reargument. She claimed that such a procedure expressly is not authorized by the Pennsylvania Rules of Appellate Procedure and that it is therefore a violation of Due Process of law for the Pennsylvania Supreme

Court to follow such a procedure.

This position, which is the heart of the Petition, clearly lacks merit. A due process violation does not occur every time a court does not strictly comply with its procedural rules. It is always within the discretion of a court to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it. American Farm Lines v. Black Ball Freight Service et. al., 397 U.S. 532 (1970)

The United States Supreme Court has decided a case virtually identical in all material respects to the errors alleged here. In Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965), this court specifically approved the granting of a second petition for rehearing, reversing an earlier and presumably final decision. The second petition for rehearing was granted, notwithstanding the provision in Supreme Court Rule 58 (4),

under which consecutive petitions for rehearings that are out of time, will not be received.[3] This per curiam opinion, expressing the views of six members of the Court, indicated that the interest in finality of litigation, expressed by appellate procedural rules limiting petitions for rehearings, must yield where the interest of justice would make unfair the strict application of that rule. Accord United States v. Ohio Power Co., 353 U.S 98 (1957), also cited by the Pennsylvania Supreme Court in their opinion here challenged (Pet. p. A1). Since the United States Supreme Court has utilized and approved precisely the same mode of procedure here under challenge, it is apparent that such departure from the strict application of the Rules of Appellate

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3 Former Supreme Court Rule 58 (4) is now renumbered as Supreme Court Rule 51.4. This Rule is virtually identical to Pa. R.A.P. 2547 in meaning.

Procedure does not amount to a violation of due process rights. Additionally, Pennsylvania Rule of Appellate Procedure 105 (a) expressly permits the state appellate courts to modify the strict application of their rules. The language of Pa. R.A.P. 105 (a), in relevant part, follows:

> In the interest of expediting decision, or for other good cause shown, an appellate court may,... disregard the requirements or provisions of any of these rules in a particular case... on its own motion and may order proceedings in accordance with its direction.

It is equally clear that the petitioner had no vested rights in the 1980 decision of the Pennsylvania Supreme Court. It has long been settled that the mere fact that a court reverses its former decision, to the prejudice of one of the parties, does not serve to deprive that party of his property without due process of law. Tidal Oil Co., et. al., v. Flanagan, 263 U.S. 444 (1924). Accord J.H. Baumann, et. al., v. Robert V. Smrha,

145 F. Supp. 617 (D.C. Kan., 1956), affirmed at 352 U.S. 863 (1957).[4]

In evaluating this petition for writ of certiorari, it is important to note the overall effect of the decision of the Pennsylvania Supreme Court. The Court simply ruled that, since the proffered evidence of fraud had probative value, the matter should be heard fully by a fact-finder. (Pet., p. A3) In effect, the ruling places the issues at the beginning of the litigation process. All parties will have full rights to present any proper evidence or make any valid argument relative to the issues. There has been absolutely no decision on the merits of the case. How are due process rights violated when the effect of a ruling is to give all parties

[4] The Pennsylvania Supreme Court made a specific finding that there was no substantial prejudice to the parties resulting from its decision to vacate its earlier decision since there had been no final distribution pursuant to the probated will. (Pet., p. A3)

the right to present probative evidence to a fact-finder? How are due process rights violated when the merits of the underlying dispute have not been resolved? The order here challenged directs that a full hearing be held, not that a full hearing be denied. The goal of the petitioner's appeal is to extinguish the new trial and to prevent a full hearing. The due process violation would occur only if the petitioner is successful in asserting technical rules to deny to the respondents an opportunity to present their probative evidence of fraud to a fact-finder.[5]

Actually, the relief requested by the petitioners at this point in the appeal process, demonstrates further the frivolity

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[5] A study of the Pennsylvania Supreme Court's order, directing that this matter be remanded for a new trial, should demonstrate that the issues here presented are not ripe for appeal. The order starts the trial process anew. The order is not final with regard to any legitimate and material issue. The parties are placed in the same position as they would have been if the case had never been tried South Pacific Co. v. Gileo, 351 U.S. 493 (1956).

of their position. She appears to have requested merely to have the opportunity to present her arguments regarding the probative value of the evidence to the State Supreme Court yet one more time. (Pet., p. 22) As outlined, the State Supreme Court has reviewed this issue on at least three occasions. The most recent ruling by the Court was unanimous. A fourth review by the State Court would be a complete waste of judicial resources. The petitioner is not really challenging the State Court's overall judgment of the case. She is seizing upon the wording of the last opinion. Full briefing and oral argument undeniably was held on the appeal of the denial of the motions for new trial, nunc pro tunc. The issues there presented necessarily included a review of the probative value of the evidence of fraud. In their opinion, the State Supreme Court expressly noted that it also had fully reviewed the

record presented at the time of the first appeal in 1980. (Pet., p. A2) Accordingly, if the Supreme Court is to be believed, they were fully aware of all the arguments ever presented on the questions of the probative value of the evidence when they rendered their decision on May 20, 1982.

The Pennsylvania Supreme Court, in choosing to treat the appeal as a second application for reargument, simply streamlined the issue. Their choice of procedural framework had absolutely no effect regarding their decision on the underlying merits and the breadth of arguments they considered.

Even if this Court held the opinion that the Pennsylvania Supreme Court committed error in their interpretation of state procedural rules, it is clear that the issue would not be proper for federal court jurisdiction. As this Court stated in United Gas Public Service Co. v. Texas, et. al., 303 U.S. 123, (1938), at p. 139:

> With respect to the proceedings in the state courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and decisions of the Texas Courts as to the proper procedure in the trial court and on appeal. It is not our function in reviewing a judgement of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. (emphasis added)

The cases cited by the petitioner to indicate that the state procedure here followed violated due process are all inopposite. The cases cited all involved the absence of a meaningful hearing prior to a state ruling.[6] Here, the issues were presented prior to the state court's decision. Further, the state court ruling guarantees

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[6] Fuentes v. Shevin, 407 U.S. 67 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S 337 (1969) and others in footnote 12 of the Petition.

parties will be provided a meaningful opportunity to be heard at a full trial rather than denied an opportunity to be heard. The issues here raised are merely questions of state court procedure, with no credible due process issue.[7]

The Petitioner also has sought to cloak her objections to the state court's interpretation of its own procedure, in the rubric of

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[7] Another reason for this Court to be extremely reluctant to interfere with the State Court's decision to grant a new trial is related to the lawsuit filed by the respondents herein in federal district court. As outlined in the statement of the case, the gravaman of Count 1 of the suit is that, at the time of the initial state court appeal in April, 1980, Richard DiSalle (alleged scrivener of the challenged fraudulent will) was secretly employed as a "consultant" to the State Supreme Court. The instant new trial was granted twenty days after the filing of the federal suit against the state court. The Justices of the State Supreme Court uniquely would be aware of what role, if any, DiSalle played in the initial appellate decision. Their decision to grant a new trial, effectively mooting count 1 of the federal suit, cannot be viewed as an abuse of discretion under all the circumstances.

equal protection doctrine. She asserts that she alone has been treated differently from all other state court litigants. She states that everyone else may rely upon a supposed inflexible state doctrine, entitled "the law of the case", and that the state court has never before considered modifying its rules to allow a second application for reargument. (Pet., pp. 22-24) Reference to decisions interpreting the state law demonstrate that these positions also lack merit.

The phrase "the law of the case" expresses only the general position of courts not to reopen what they have already decided. But clearly the doctrine is not a limitation on their power. The rule of "the law of the case" is one largely of convenience and public policy, and it must be accommodated to the needs of justice. Where a prior decision is palpably erroneous, Pennsylvania State Law allows a court, as

a matter of grace, to correct it upon a second review. Reamer's Estate, 331 Pa. 117, 200 A.35 (1938). Accord Burke v. Pittsburgh Limestone Corp., 375 Pa. 190, 100 A.2d 595 (1953)

The use of the procedural device of a second application for reargument, in modification of the Pennsylvania Rules of Appellate Procedure also has previously been given express approval by the Pennsylvania Supreme Court. The case recognizing the use of such a procedure, Aiken Industries Inc. v. Wilson, 482 Pa. 625, 394 A.2d 497, (1978), also was cited specifically by the Pennsylvania Supreme Court in their ruling here under challenge. (Pet. p. A1).

The doctrines relied upon by the petitioner to argue that she has been denied the equal protection of the law show precisely the opposite. The doctrines demonstrate that the law has flexibility and that rules must be accommodated to address the unique individual circumstances

presented by each case. The state supreme court has not singled out the petitioner for special, unprecedented treatment. In the proper exercise of their discretion, to correct a previous injustice, they have not created a forlorn class or group of individuals to be denied substantive procedural protections. Try as she might, the petitioner has raised no proper ground to justify this Court's interference with procedural matters which are exclusively the concern of the Pennsylvania Supreme Court. Such interference would serve only to create uncertainty as to a state court's discretion to promote the ends of justice in any given individual case.

III.

No Federal Issue Was Preserved in the State Court

The so-called federal issues raised in the petition for writ of certiorari were presented for the first time in a

third application for reargument. The petitioner took issue with the manner in which the Pennsylvania Supreme Court had granted a second application for reargument. On June 10, 1982 this third application for reargument was dismissed summarily by the Pennsylvania Supreme Court, without any opinion whatever.

The Pennsylvania Rules of Appellate Procedure do not permit the filing of third application for reargument. No motion to modify the Rules for Appellate Procedure for such a third application was made or granted.[8] In these circumstances it must be said that this third application for reargument was a complete nullity, totally unrecognized in state law. It was contended earlier in this

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8 The lack of permission by the Pennsylvania Supreme Court distinguished the unauthorized third application for reargument, from the second application for reargument which actually was expressly authorized by that Court.

brief that such a nullity could not be relied upon to extend the time for docketing a petition for writ of certiorari in this Court. It should equally be evident that such an unrecognized nullity can not be relied upon to preserve federal issues.

After the court of last resort of a state has pronounced its decision, it is too late to raise a federal question for the first time in a petition for rehearing. If the order of court is nothing more than a denial of the motion, the decision will not be reviewed by the United States Supreme Court. The decision will be reviewed only if the court entertains the motion and passes upon the federal question. This includes claims of denial of due process and deprivation of equal protection as a result of a state court decision. Consolidated Turnpike Co. v. Norfolk and O.V.R. Co., 228 U.S. 326 (1913); Tidal Oil Company

et. al. v. Flanagan, supra; Bloeth v. State of New York, ___ U.S. ___, 82 S.Ct. 661, 7 L. Ed.2d 780 (1962).

Conclusion

For the reasons set forth above, the respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,

Peter M. Suwak

Peter M. Suwak
Attorney for Respondents

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE:	:	
	:	
ESTATE OF	:	NO. 81-1-32
PAUL CIAFFONI,	:	
	:	NO. 81-1-79
	:	
Deceased	:	

BRIEF OF APPELLEE

SPRAGUE & RUBENSTONE

Suite 400
Wellington Bldg.
135 South 19th St.
Philadelphia, PA 19103
(215) 561-7681

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. Are publicly filed documents, which were known by the appellants to have existed prior to trial but not used at trial, which are merely cumulative of evidence which was originally rejected by the trial court, and which are being produced merely to impeach the credibility of witnesses who testified at trial, documents which constitute "newly discovered evidence" for purposes of granting a motion for new trial?

2. Where evidence was ruled inadmissible at trial, which ruling was affirmed by the Supreme Court of Pennsylvania, does the mere fact that additional inadmissible evidence is now produced require that a new trial be granted?

3. Has there been an appearance of impropriety created by any Court in connection with this litigation?

III.

THE ALLEGED NEWLY DISCOVERED EVIDENCE IS INADMISSIBLE ON THE SUBJECTS OF LINGUISTIC AND TYPING STYLE OF THE DECEDENT'S WILL SINCE THE SCIENTIFIC COMMUNITY HAS NEVER ACCEPTED THE PRINCIPALS AND TECHNIQUES INVOLVED

In order to grant a new trial for newly discovered evidence, it is necessary that the evidence be admissible. McDermott v. Marlow, 336 Pa. 337, 9 A.2d 420 (1939). The evidence proposed to be introduced if a new trial is granted would not be admissible.

Prior to the trial of this case, the appellants caused alleged experts engaged by them to examine approximately 50 wills probated in the Washington County Register of Wills office, which wills were in backers bearing the name "Richard DiSalle." The appellants contended that each of these 50 Wills was prepared by Richard DiSalle before he ascended to the bence and while he was a

practicing attorney in Washington County; and, that the Wills were typed by his secretary, Frances Gray. The experts proposed to testify on two topics:

(1) certain typing characteristics allegedly present to a different extent in the decedent's Wills than in the comparison Wills;

(2) certain linguistic or stylistic characteristics also allegedly present to a different extent in the decedent's Will than in the comparison Wills.

The trial Court correctly excluded the proffered testimony. The additional documents discovered since trial, and purportedly evidencing the same discrepancies, would also be inadmissible.

The appellants alleged at the original trial, and the appeal following that trial, that the 50 or so wills examined by them were sufficient to permit a valid comparison

between them and the decedent's Will. The evidence at trial contradicted that assertion on several grounds. First, it was not and could not be shown that the same typist prepared each of the comparison wills. Frances Gray testified that replacement secretaries worked in the office when she took vacations or was ill. She also testified that her vacation schedule was irregular, and that different replacement secretaries would be hired during her vacations. Accordingly, it is impossible to determine which of the original comparison wills would have been typed by her, and how many and which of them were typed by various temporary replacements. The "newly discovered" documents are subject to the same critical analysis. In the absence of any certainty about the identity of the typist of the comparison documents, it would be impossible for the factfinder to reach any conclusions based on the comparison of typing samples.

Second, the appellants did not and could not identify any readily distinguishable features for comparison. The evidence at trial established that Richard DiSalle did not have an established format or style manual for typewritten work produced in his office. Mrs. Gray testified that she would alter her typing style for longer documents, and the Will of Paul Ciaffoni is longer than any other will proffered by the appellants.

The most important reason for excluding the proffered evidence concerning the linguistic or typing style of the decedent's Will is that it is derived from an earlier will prepared by another attorney. Richard DiSalle testified that the present Will was a revision of a Will he prepared for the decedent in 1967, and that the 1967 Will was itself a revision of a Will prepared for the decedent in 1965 by Patrick Derrico, Esquire. The decedent's Will is, therefore, the product of the drafting techniques of two different

attorneys, and even the most reliable analytical techniques would be valueless in comparing it to other wills or deeds prepared solely by Richard DiSalle.

The testimony adduced at trial clearly establishes that, far from expecting similarties among the proffered typing samples, any comparison would probably reveal differences between the decedent's Will and the comparison wills. The evidence would exclude the drawing of inferences about the identity of the drafter or typist of the decedent's Will.

At trial, the appellants made various offers of proof to introduce testimony of alleged "experts" who would compare the decedent's Will with the comparison wills, to show that the comparison wills had different typing and linguistic characteristics. However, there was nothing in the offers of proof as to any of these proposed witnesses which would establish that what

they did was in any way scientific. If there is any significance at all to the use or non-use of certain techniques, where the frequency with which words, phrases or stylistic items occur, this significance was never offered by the appellants' counsel. In particular, it was never shown that the whole concept of measuring the frequency of words or phrases from one document to another has any scientific acceptance whatever.

No analytical technique can form the basis for expert testimony unless experts generally regard that technique as scientifically valid, so that it's use is meaningful. No such validity was offered to be proven in the appellants' proposed at the original trial, and no such technique is proffered in the Motions for New Trial. In Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277, this Court reaffirmed that the threshold question must always be whether or not the proffered "expert testimony" has acheived scientific acceptance. In Topa,

this Court stated:

> [a]dmissibility of [scientific] evidence depends upon the general acceptance of its validity by those scientists active in the field to which the evidence belongs. Id, 471 Pa. at 231, 369 A.2d at 1281 (1977) (emphasis in original).

Since there is no evidence to support the proposition that there ever has been general acceptance of the typing and linguistic analysis offered by the appellants' experts, the exclusion of their proffered testimony was completely proper at trial.

The exclusion of the allegedly "newly discovered evidence" would also be compelled. It has already been shown that Kane's Estate, supra, ans Lare's Estate, supra, are irrelevant to the issue presented in this case; that is, whether the evidence would be admissible under any circumstances. It is clearly inadmissible. Scientific acceptance of the appellants' proposed evidence does not exist. The test of admissibility is set forth in Commonwealth v. Topa,

supra. That case quoted with approval the earlier case of Frye v. United States, 293 F. 1013 (D. C. Cir. 1923) which held:

> ...while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principal or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. Id., at p. 1014.

Nothing cited by the appellants in their Brief points to scientific acceptance of the so-called typing elements or linguistic analysis which the appellants wish to propound. Even if it did, the uncontroverted fact remains that the appellants did not and cannot prove that Mrs. Gray typed the comparison wills. Without that basic foundation, the appellants' evidence is meaningless.